

Doing Business in the United States: Environmental Compliance

Environmental protection in the United States is today governed by an array of complex and sometimes conflicting federal and state regulatory programs that affect every aspect of land development, manufacturing, construction, transportation, and emissions. To engage in almost any kind of business endeavor in the United States requires a keen awareness of and attention to compliance with all the applicable federal environmental statutes and regulatory programs. Key environmental issues affecting business include industrial waste, sustainable development of raw materials, and water and air emissions. These federal environmental requirements can require businesses to change equipment and procedures to meet imposed standards, and to comply with federal permitting requirements. Failure to comply with applicable environmental requirements can result in the imposition of major monetary penalties. In addition to federal environmental requirements, there are often state environmental requirements that businesses must also comply with.

The discussion contained herein is not intended to serve as legal advice or as a substitute for legal advice from an experienced environmental attorney. This brief introduction to the major environmental statutes in the United States is intended only to serve as an introduction to the kinds of environmental programs that could apply to any new business venture in this country.

Clean Water Act

The Clean Water Act is the primary federal law in the United States governing water pollution. Its objective is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. The Clean Water Act prohibits the discharge of pollutants into navigable waters, including marshes and wetlands, without a permit. Most permits, other than for wetlands (which are administered by the United States Army Corps of Engineers), are issued by state environmental agencies, operating under authority delegated by the United States Environmental Protection Agency.

Wetlands are considered waters under the Clean Water Act, and any disturbance of wetlands (which may include marshes or other low-lying land that collects water) without a permit is prohibited. Land development is particularly affected by the wetlands permit requirement, which may prohibit development that is not water-dependent.

Citizens and civic groups may sue in federal court to halt violations of the Clean Water Act, including wetlands. The Environmental Protection Agency and state environmental agencies also have broad enforcement authority.

A person who violates the Clean Water Act by discharging pollutants without a permit, or in excess of limits of a permit, faces civil penalties of \$37,500 per day. Intentional violations may result in months or years in a federal prison, plus criminal fines and forfeitures.

Clean Air Act

The Clean Air Act is a federal law designed to protect the nation's environment by regulating stationary and mobile air emissions. The Clean Air Act authorizes and defines

the Environmental Protection Agency's responsibilities for protecting and improving the nation's air quality and the stratospheric ozone layer. In recent years, climate change has also become a major focus of Clean Air Act regulation.

The Clean Air Act regulates stationary sources like factories, power plants and agricultural processing. Regulated facilities must obtain permits, often from state agencies operating under Environmental Protection Agency supervision, which limit the pollutants they emit. Among the regulated pollutants are 187 types of toxics, as well as carbon monoxide, lead, ground-level ozone, nitrogen dioxide, particulate matter, and sulfur dioxide. Recently, greenhouse gases have also become regulated. Mobile sources (cars, trucks) and many types of internal combustion engines are also regulated.

Penalties for violations of the Clean Air Act include \$37,500 per day for each violation. Intentional violations are also punishable by imprisonment for up to five years. The Clean Air Act also authorizes citizens and civic groups to sue to enforce its terms. Many states (notably California) have their own, additional clean air statutes, imposing requirements over and above those of the federal Clean Air Act.

Comprehensive Environmental Response, Compensation and Liability Act

The Comprehensive Environmental Response, Compensation and Liability Act is a federal government program designed to clean up sites contaminated with hazardous substances. Under the Act, the Environmental Protection Agency may compel parties to clean up pollutants they have released into the environment, or the Environmental Protection Agency may do the cleanup itself and then sue the responsible parties to

recover the cost of performing the cleanup. The Act also authorizes federal natural resource agencies, such as the Interior and Agriculture Departments, to recover damages for injury done to natural resources.

The Act, or Superfund, was first enacted by Congress on December 11, 1980. The law created a tax on petroleum and chemical industries, and raised \$1.6 billion over a five-year span. The Act authorized the Environmental Protection Agency to directly respond to releases or threatened releases of hazardous materials that would potentially be harmful to public health or the environment. Not only did the law create a trust fund that provided resources for the cleanup of these hazardous materials, but it also established prohibitions and requirements for dealing with closed hazardous waste sites and provided liability for those who were deemed responsible for the creation of those sites.

The Act was later amended on October 17, 1986 by the Superfund Amendments and Reauthorization Act. This amendment reflected the experience of the Environmental Protection Agency and was passed in hopes of easing some of the complexities of the Act. The Superfund Amendments and Reauthorization Act tweaked many details from the original Superfund, including increasing the trust fund budget to \$8.5 billion, increasing State involvement in the cleanup of hazardous sites, and placing an emphasis on the importance of permanent remedies.

The Act authorizes the Environmental Protection Agency to take two kinds of actions. The Environmental Protection Agency may respond to immediate threats to

human health or the environment via an emergency removal action. Alternatively, where such immediate threats are not present, the Environmental Protection Agency may undertake remedial actions to permanently clean up the site, after first investigating and then listing them on the Environmental Protection Agency's National Priorities List.

Superfund Amendment and Reauthorization Act Title III

The reporting requirements sections found in the Superfund Amendment Reauthorization Act, those sections being 311 and 312, are commonly referred to as the "Community Right to Know" sections. Section 311 requires companies in possession of a specific threshold amount of hazardous materials to submit a safety data sheet regarding their inventory of such materials. This information must only be reported once, or whenever a significant change in inventory occurs. Section 312 requires the annual submission of an annual emergency and hazardous chemical inventory form.

Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act regulates the management of hazardous waste. Among the businesses regulated are all types of plants or processes using hazardous materials, including small businesses like dry cleaners, paint shops, gas stations and auto repair shops. EPA also regulates hazardous waste recycling and underground storage tanks for oil and gas. In addition, many states have their own programs regulating recycling and hazardous waste storage and disposal.

EPA, states, citizens, and civic groups may sue violators of the Act. Violations of the Act are punishable by both civil and criminal fines, and by imprisonment.

Endangered Species Act

The Endangered Species Act protects endangered plants and animals, and their habitats. The Act also regulates international trade in endangered species. Species protections are an important consideration in every land development or building project within the United States.

Under the Act a species may be classified as either endangered or threatened. An endangered species is one that is “in danger of extinction throughout all or a significant portion of its range.” A threatened species is defined as a species that “is likely to become endangered within the foreseeable future.” Once identified as endangered or threatened, a species is added to the endangered species list, where it gains the protections of the statute.

When listing a species, the agency may also designate critical habitat for that species. Once designated, the critical habitat gains protections under the Act. The Endangered Species Act prohibits anyone from harming, killing, or hunting the species, or injuring its breeding or feeding grounds. Thus, where an endangered species is present, land development or disturbance is generally prohibited. The Government, states, citizens, and civic groups may sue violators of the Act. Violations of the Act are punishable by both civil and criminal fines, and by imprisonment.

Migratory Bird Treaty Act

The Migratory Bird Treaty Act was enacted in 1918 to enforce a 1916 convention with Great Britain, and was amended by subsequent treaties with Mexico, Japan, and the

Soviet Union. The Act prohibits injuring or capture of any migratory bird, and regulates industries as diverse as mining, oil production and wind turbines.

The pursuit, capture, possession, sale, purchase, shipment, or transportation of any migratory bird outlined in the Act. The Migratory Bird Treaty Act's prohibitions include attempting to accomplish any of the above activities and attempting to accomplish or accomplishing them with regard to any part of a bird, its nest, or its eggs. The birds included under this Act were at first limited to those protected by the Great Britain Convention, but with the subsequent amendments now include birds recognized by United States' treaties with Mexico, Japan, and the Soviet Union. Violation of the Act carries criminal fines and penalties.

Federal Insecticide, Fungicide, and Rodenticide Act

The Federal Insecticide, Fungicide, and Rodenticide Act was enacted in 1947 to regulate the distribution, sale, and use of pesticides. The Act was amended in 1972 through the Federal Environmental Pesticide Control Act and again in 2003 through the Pesticide Registration Improvement Act. All pesticides must be registered under the Act, with the appropriate data, or their sale is prohibited. As part of the registration process, the Environmental Protection Agency will classify the pesticide as "for general use" or "for restricted use," and the pesticide may then be subject to use only under supervision or additional regulations. The Environmental Protection Agency can inspect at reasonable times any entity involved in the sale, use, or distribution of a substance covered by the statute. The Environmental Protection Agency can also issue an order

stopping the “sale, use, or removal” of any pesticides not in compliance with this Act.

The Act regulates pesticides used in agriculture, food processing, landscaping and building maintenance. States often regulate pesticides under additional state laws.

Violation of the Act is punishable by civil and criminal fines and imprisonment.

Toxic Substances Control Act

The Toxic Substances Control Act was passed by Congress in 1976, and most recently amended in 2016, to regulate the use and sale of chemical substances or mixtures to protect public health and the environment. The Act regulates substances like asbestos and lead paint, which are generally regulated by additional state laws. The Act most significantly affects building renovation or demolition. Violations of the Act are punishable by civil and criminal fines, and by imprisonment.